

ESTTA Tracking number: **ESTTA259946**

Filing date: **01/12/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Energy Brands Inc. d/b/a Glaceau
Granted to Date of previous extension	01/11/2009
Address	17-20 Whitestone Expressway Whitestone, NY 11357 UNITED STATES
Attorney information	David H. Bernstein Debevoise & Plimpton LLP 919 Third Avenue New York, NY 10022 UNITED STATES dhbernstein@debevoise.com, trademarks@debevoise.com, szparnass@debevoise.com Phone:212-909-6000

Applicant Information

Application No	79046243	Publication date	07/15/2008
Opposition Filing Date	01/12/2009	Opposition Period Ends	01/11/2009
International Registration No.	0943485	International Registration Date	09/28/2007
Applicant	JAMNICA d.d. Getaldiceva 3 HR-10000 Zagreb CROATIA		

Goods/Services Affected by Opposition


Class 032. All goods and services in the class are opposed, namely: Mineral and aerated waters; non-alcoholic drinks, namely, bottled drinking water, energy drinks; fruit drinks and fruit juices; syrups for beverages; preparations for making beverages in the nature of fruit juices, energy drinks and mineral waters
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Grounds for Opposition

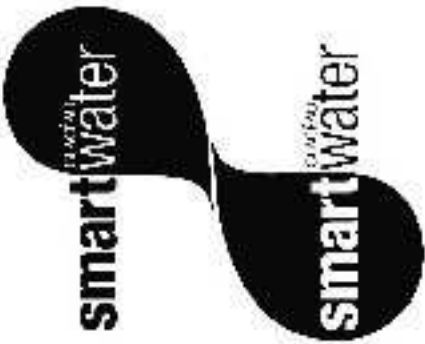
False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)

Marks Cited by Opposer as Basis for Opposition

U.S. Registration	2778914	Application Date	12/02/2000
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No.			
Registration Date	11/04/2003	Foreign Priority Date	NONE
Word Mark	SMARTWATER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 1996/01/00 First Use In Commerce: 1996/01/00 BOTTLED DRINKING WATER		

U.S. Registration No.	2740881	Application Date	07/28/1998
Registration Date	07/29/2003	Foreign Priority Date	NONE
Word Mark	GLACEAU SMARTWATER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 1996/01/00 First Use In Commerce: 1996/01/00 BOTTLED DRINKING WATER		

U.S. Registration No.	3420245	Application Date	01/26/2006
Registration Date	04/29/2008	Foreign Priority Date	NONE
Word Mark	GLACÉAU SMARTWATER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2006/01/01 First Use In Commerce: 2006/01/01 Bottled drinking water		

Attachments	76174464#TMSN.gif (1 page)(bytes) 78799834#TMSN.jpeg (1 page)(bytes) SMART_[drinks]_Notice_of_Opposition.pdf (5 pages)(14695 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/S. Zev Parnass/
Name	S. Zev Parnass
Date	01/12/2009

In the Matter of Trademark Application Serial No. 79/046,243
Filed: September 28, 2007
Mark: SMART [drinks]
Published: July 15, 2008

Commissioner for Trademarks
United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Energy Brands Inc. d/b/a Glacéau (“Energy Brands”), a New York corporation with its principal place of business at 17-20 Whitestone Expressway, Whitestone, New York 11357, believes that it will be damaged by the registration of the mark SMART [drinks] by Applicant Jamnica d.d. (“Applicant”) and hereby opposes the same, by and through its attorneys, Debevoise & Plimpton LLP, based upon the following grounds:

1. Energy Brands pioneered the enhanced water category when, in 1996, it launched its SMARTWATER brand, a vapor-distilled water enhanced with electrolytes.

2. Energy Brands owns United States federal trademark registration number 2,778,914 for the SMARTWATER mark for “bottled drinking water” in Class 32.

Energy Brands also owns United States federal trademark registrations for the marks GLACEAU SMARTWATER (Reg. No. 2,740,881) for “bottled drinking water” in Class 32 and GLACÉAU SMARTWATER and Design (Reg. No. 3,420,245) for “Bottled drinking water” in Class 32.

3. Energy Brands has used the SMARTWATER and GLACEAU SMARTWATER marks in interstate commerce since 1996, long prior to Applicant’s 2007 application for the SMART [drinks] mark. By virtue of the enormous success of the SMARTWATER brand, the SMARTWATER, GLACEAU SMARTWATER and GLACÉAU SMARTWATER and Design marks have become associated exclusively with Energy Brands. Energy Brands’ SMARTWATER and other products also have received considerable attention in the media.

4. By the application herein opposed (the “Application”), Applicant seeks to register the mark SMART [drinks] for “Mineral and aerated waters; non-alcoholic drinks, namely, bottled drinking water, energy drinks; fruit drinks and fruit juices; syrups for beverages; preparations for making beverages in the nature of fruit juices, energy drinks and mineral waters” in Class 32. Applicant’s application was filed under the Madrid Protocol, pursuant to which no allegation of use is required (and apparently none has been filed).

5. Applicant’s SMART [drinks] mark is highly similar to Energy Brands’ SMARTWATER, GLACEAU SMARTWATER and GLACÉAU SMARTWATER and

Design marks cited above, as both Energy Brands' and Applicant's marks contain the word SMART followed by a word that denotes a beverage (water versus [drinks]).

6. Moreover, the goods set forth in the Application are identical or closely related to the goods in connection with which Energy Brands has registered and uses the SMARTWATER, GLACEAU SMARTWATER and GLACÉAU SMARTWATER and Design marks cited above. Both Energy Brands' and Applicant's marks include water (which, of course, is a beverage) in the identification of goods. The remainder of Applicant's goods are for other beverages or for syrups or preparations for beverages. Thus, both Energy Brands' and Applicant's marks are used or intended for use in connection with beverages or goods used to prepare beverages.

7. Based on the foregoing, Energy Brands will be damaged by the registration sought by Applicant because such registration will support and assist Applicant in the confusing and misleading use of the mark sought to be registered and will give color of exclusive statutory rights to Applicant in violation and derogation of the prior and superior rights of Energy Brands.

8. Registration should be refused pursuant to Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), on the grounds that Applicant's use of the mark SMART [drinks] falsely suggests a connection between Applicant and Energy Brands, with consequent injury to Energy Brands and to the public.

9. Registration also should be refused pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), on the grounds that Applicant's SMART [drinks] mark so resembles Energy Brands' SMARTWATER, GLACEAU SMARTWATER and

GLACÉAU SMARTWATER and Design marks cited above and used consistently by Energy Brands in the United States as to be likely to cause confusion, or to cause mistake, or to deceive, with consequent injury to Energy Brands and to the public.

WHEREFORE, Energy Brands believes it will be damaged by the registration by Applicant of the SMART [drinks] mark for the goods identified in the Application and respectfully requests that the Opposition be sustained, registration of said mark be denied, and that the Trademark Trial and Appeal Board grant such other and further relief as it deems just and appropriate.

Payment has been provided in the requisite amount to cover the statutory filing fee for filing a Notice of Opposition. All communications should be addressed to Energy Brands' counsel, Debevoise & Plimpton LLP, at the address stated below.

Dated: January 12, 2009
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

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Attorneys for Opposer
Energy Brands Inc. d/b/a Glacéau

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Opposition has been sent via first class mail (certified and return receipt requested), postage prepaid, on this 12th day of January, 2009 to:

Allyn Taylor, Esq.
DLA Piper US LLP
2000 University Avenue
East Palo Alto, CA 94303

/S. Zev Parnass/
S. Zev Parnass